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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 445

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.	Petition for Writ of Certiorari.
BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, *Petitioner,* vs. GEORGE R. JOSLYN, et al., *Respondents.*	

PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA KEVIEW 5-6581

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Benevolent and Protective Order of Elks of the United States of America (herein called "the Elks"),

prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this case on July 2, 1952 (Tr. 428); rehearing and mandate denied September 29, 1952 (Tr. 511-12).

Opinions Below.

A copy of the opinion of the Court of Appeals, filed July 2, 1952 (Tr. 422-6) as modified by order of that Court entered September 29, 1952 (Tr. 511-12) is printed in the appendix hereto. It is reported officially in *In re Joslyn's Estate,* 198 F. 2d 673.

The opinion of the District Court Judge is reported officially at 102 F.S. 521. His opinion is also to be found at Tr. 365, and his findings of fact and conclusions of law at Tr. 371. The final decree appealed from appears at Tr. 384.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The bankruptcy estate involved in this case is solvent; although the trustee in bankruptcy has been prevented from collecting any assets of the Estate. The petitioner is a large creditor in the bankruptcy proceeding (Tr. 68, 142, 381).

The Court of Appeals affirmed a so-called "Final Decree" of the District Court which: a) had the effect of substituting an Illinois State Court for the bankruptcy court in adjudication of claims of the bankruptcy creditors and of an issue of interest on the claims pending under advisement in the bankruptcy court; b) held that a payment on behalf of the bankrupt to a receiver of the state court discharged the bankrupt from claims of creditors in bankruptcy; and c) resulted in distribution of funds so paid to persons not creditors in the bankruptcy proceedings (Tr. 376-9, 384-7, 391-2). The effect of the decision and order of the Court of Appeals was to repudiate the exclusive jurisdiction of the bankruptcy court; to substitute administration by the state court; and to deprive the Elks and other creditors in bankruptcy of some twenty-years' interest on their claims while freeing to the bankrupt administrable property valued by him in his schedule at more than $500,000.

In 1932 Chicago Bank of Commerce became insolvent and went into liquidation. One Hillmer, et al., depositors of the bank, filed in the Superior Court of Cook County, Illinois, a suit (herein called the state court suit), on behalf of themselves and all other depositors, to enforce stockholders' liability. George R. Joslyn, the bankrupt herein, was a stockholder and was joined as a defendant. (Tr. 68, 372-3).

In 1936 the bankrupt, George R. Joslyn, fraudulently initiated this proceeding by filing his voluntary petition in bankruptcy in the United States District Court for the Northern District of Illinois, Eastern Division, with false schedules; and was adjudicated and discharged. In 1946 the proceeding was reopened as fraudulent on petition of the Elks. Among other frauds the bankrupt had omitted from his schedule of assets his interests under two trusts (herein called "Joslyn trusts" (valued by the bankrupt in a schedule filed after the reopening at $546,757.30)). These trust interests were later held to be administrable assets. A trustee in bankruptcy was appointed and from 1946 to 1951 he tried in vain to bring into the bankruptcy court assets of the bankrupt, including his interests under the Joselyn trusts, in order that the administration might proceed in the usual course. He filed and strenuously prosecuted three plenary suits to collect assets. (Tr. 131, 132, 140, 141, 371, 372, 374, 375, 380, 381. See also *In re Joslyn's Estate,* 168 F. 2d 803 (1948); *In re Joslyn's Estate,* 171 F. 2d 159 (1949); *Young* v. *Handwork,* 179 F. 2d 70 (1950), cer. den. 339 U.S. 949, rhrg. den. 339 U.S. 991; *In re Fisher,* 179 F. 2d 361, 363, 364, 365 (1950), cer. den. 340 U.S. 825.)

The Elks' claim is based on liability of the bankrupt as a shareholder in the bank. There is no issue respecting the principal amount of that liability ($57,100), the bankrupt having included it in his original schedule of liabilities and admitted it formally in the proceedings. There is, however, the question whether or not the creditors are entitled to interest on their claims against the solvent estate. (Tr. 68-9, 72, 119, 372, 373, 374-5.)

In 1950 the bankrupt, by his attorney, one Hubbard, presented the interest issue to the bankruptcy court for determination and, with the court's leave, filed a petition

The petition made reference to the interest issue, alleged that the bankrupt was able to pay all claims provable against the estate, and prayed that the court order the receiver of the bank to liquidate its claims, and that all persons having claims for fees should file petitions and have them determined. It also prayed that as soon as the claims were ascertained the bankrupt be given leave to pay into the bankruptcy court the claims so adjudicated, that all further proceedings in the matter be "restrained" until the claims were ascertained, and for general relief. (Tr. 67-70, 71.)

The petition and incident pleadings were referred to a referee. The Elks filed an answer jointly with other creditors adopting as theirs an answer filed by the trustee in bankruptcy and also alleging: 1) that the court was without jurisdiction to grant the prayers of the petition because of a mandate of the Court of Appeals that the proceedings continue in the usual course; 2) that by the mandate and provisions of the Bankruptcy Act the creditors were entitled as a matter of law to have the estate and all its assets administered by the trustee in bankruptcy and not by the bankrupt or anyone acting for or in collaboration with him. The trustee's answer adopted by the Elks prayed that the bankrupt's petition be denied; that judgment be entered in favor of the trustee in a plenary suit filed by him to collect accrued income of the Joslyn trusts, and that the bankruptcy proceeding be referred generally, to continue in due course. The position of the Elks was that the interest issue should be adjudicated by the bankruptcy court, after first taking possession of the administrable assets, in due course of administration. (Tr. 77-91, 102.)

In the hearing before the referee both the bankrupt and his attorney admitted that the funds he was to pay into court after adjudication of the liability and claims would

come from the trust interests which had vested in the trustee in bankruptcy, and which the trustee in bankruptcy had been vainly trying for years to collect. (Tr. 141; *Young* v. *Handwork,* 179 F. 2d 70 (1950), cer. den. 339 U.S. 949, rhrg. den. 339 U.S. 991.)

The referee conducted hearings on the issues under the petition and incident pleadings, heard testimony, considered briefs, and filed a report on March 16, 1951. (Tr. 127-183). In the report he recommended that the court enter an order that all provable claims be filed and adjudicated, and that after their filing and adjudication the court enter a further order directing the bankrupt, the trustees of the trusts, and a depositary to pay into court an amount sufficient to pay all the claims and fees. He also recommended that an order be entered restraining further efforts by the trustee in bankruptcy to collect assets upon the filing in the proceeding of written representations by the bankrupt, trustees of the Joslyn trusts and a depositary of income from those trusts, that they would, when ordered to do so, pay to the trustee in bankruptcy an amount sufficient to pay all the proven and adjudicated claims. The referee discussed the interest question in the report but made no finding or recommendation on it, except to recommend that the question be held for determination when the claims were adjudicated in the administration of the estate. The bankruptcy court took the matter under advisement on April 20, 1951 but did not pass upon the referee's report until November 8, 1951 when, in the final decree appealed from, it approved and adopted it. (Tr. 155-7, 242, 367, 384-5.)

In the meantime on July 12, 1951, while the issues presented by the petition and incident pleadings were so before the bankruptcy court under advisement,

one Hubbard, the attorney for the bankrupt in the bankruptcy proceedings, filed in the state court suit a petition in the name of the bankrupt's father, Marcellus L. Joslyn, in which the father offered to pay the bankrupt's stock liability provided the state court would adjudicate its amount at $57,100 before a specified short date. On July 18, 1951 the state court purported to so adjudicate the claim, and entered an order directing the *bankrupt* (not the father) to pay that amount to the receiver in the state court case, for the use and benefit of the creditors of the bank entitled to share in it, with interest only after the date of the decree; and pursuant to that order the father paid that amount to the receiver. (Tr. 242, 245-247, 367, 376, 378-9, designation of attorneys at 102 F.S. 521, signature to answer of bankrupt, Tr. 319.)

The state court judge who entered the order later stated in open court in explanation of its entry, that he entered it "very reluctantly" at the persistent importunity of Hubbard (attorney for the bankrupt) and only after talking about it with the judge of the bankruptcy court and a lawyer named Joseph A. Conerty, to whom the bankruptcy judge referred him; and that in entering the order he was influenced by their attitudes. Conerty is attorney in these bankruptcy proceedings for the trustees of the bankrupt's trusts, who were defendants in the plenary suit of *Young* v. *Handwork;* See 179 F. 2d 70 (1950) cer. den. 339 U.S. 949. In his statement the state court judge also said that he had required all counsel to approve the order in writing; and expressed surprise that later the lawyers went before another judge and another order was entered distributing fees. (Tr. 390, 391, 394, 396-7; Conerty's signature to pleading, p. 325; designations of attorneys at 171 F. 2d 160; 179 F. 2d 70; 102 F.S. 521.)

Upon learning of the foregoing proceedings in the state court the trustee in bankruptcy and the Elks unsuccessfully endeavored in the state court to have the state court order vacated and to induce the bankruptcy court not to enter the final decree appealed from. (Tr. 242-243, 249-260, 268-279, 279-283, 294-310, 326-334.)

Although in the final decree the District Court approved and adopted the referee's report the decree was inconsistent with it in many respects. Instead of requiring the filing of claims and adjudicating the interest question, the court in the decree and supporting conclusions of law: 1) held that the state court had the jurisdiction and power to enter its decree of July 18, 1951; 2) held that the Elks and other creditors of the bank were bound by that decree and the payment of $57,100, without any interest, in satisfaction of it; 3) held that the release given by the state court receiver to the bankrupt released the bankrupt from the claims of each creditor of the bank on his stockholder's liability; 4) held that there were no claims of creditors of the bankrupt remaining unsatisfied which were provable against the bankruptcy estate; 5) vacated four restraining orders with respect to the bankrupt's trust interests and proceeds from the trusts except with respect to $50,000 to be held pending determination of allowances; and 6) directed the trustee in bankruptcy to dismiss his plenary suits to collect assets. (Tr. 382, 383, 384-6.)

Basis of Jurisdiction.

Jurisdiction is invoked under the Act of Congress of June 25, 1948, c. 646, (1), 62 Stat. 928; U.S.C.A., Title 28, §1254, (1); 28 U.S.C. §1254, (1) and 11 U.S.C. 47.

Questions Presented.

The following questions are presented:

1. Whether the District Court had paramount exclusive jurisdiction in this proceeding of the adjudication of the liability of the bankrupt to the creditors in bankruptcy for interest on the admitted principal indebtedness of $57,100.

2. Whether the state court decree of July 18, 1951 violated the paramount exclusive jurisdiction of the District Court by purporting to adjudicate and discharge the indebtedness of the bankrupt.

3. Whether that decree, or the incident release by the state court receiver, discharged the liability of the bankrupt to the bankruptcy creditors.

4. Whether the District Court violated provisions of the Bankruptcy Act by not reducing to its possession administrable assets of the bankrupt's estate, adjudicating claims, and making distribution to creditors in the bankruptcy proceeding.

5. Whether under its exclusive jurisdiction the District Court had jurisdiction or discretion or was otherwise at liberty to rely on the state court decree which purported (1) to determine the amount of the bankrupt's indebtedness to his creditors; (2) to determine the persons entitled to receive payment of such indebtedness; and (3) to preclude the creditors from claiming interest in this proceeding against the solvent estate; and, in reliance on the state court decree, to terminate further proceedings in bankruptcy (other than the fixing of fees and expenses); thus eliminating ad-

judication and payment of claims and interest in the bankruptcy court and terminating collection by the trustee in bankruptcy of assets previously determined by the Court of Appeals to be administrable assets.

6. Whether the Court of Appeals, by affirming the Final Decree of the District Court, violated fundamental principles of bankruptcy law and so far sanctioned such a departure by the District Court in this case from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of the Supreme Court's power of supervision.

Of the foregoing questions, the answers to those numbered 1, 2, 4 and 6 should be affirmative and the answers to those numbered 3 and 5 should be negative. The decree of the Court of Appeals is in each instance inconsistent with and contrary to such answers.

Reasons Relied On For Allowance Of The Writ.

The Court of Appeals has in this cause decided federal questions in a way in conflict with applicable decisions of the Supreme Court and has so far sanctioned such a departure by the District Court from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of the Supreme Court's power of supervision.

The Court of Appeals order adversely affects the Elks in the following respects:

1. The interest issue should have been adjudicated, and interest should have been allowed, by the District Court. Instead, that court treated as binding on it and the Elks the decree of the state court allowing no interest (except interest on that decree itself): (Tr. 377, 382, 390).

2. Under the state court decree the $57,100 was paid to the state court receiver for the use and benefit of such creditors of the bank as the state court might hold were entitled to share therein, and thereby accrued to their benefit and

not to the benefit of the bankruptcy creditors. While the Elks was both a bankruptcy creditor and a creditor of the bank, the distribution of the funds by the state court receiver was prejudicial to the Elks because the funds were surcharged with expenses of the state court receivership, in the discretion of the state court and not under the supervision of the bankruptcy court.*

*Note: Undisputed evidence received in the hearings before the referee showed that in the state court suit over 41% of the total funds collected by the state court receiver to that time had been disbursed for attorneys' fees and other expenses (Tr. 145-6).

By its decision and order the Court of Appeals affirmed an abandonment by the District Court of the exercise of its paramount and exclusive jurisdiction to perform three of the most important functions of a court in bankruptcy:

1. Collection of administrable assets of the bankrupt.

2. Adjudication of claims and interest due thereon by the solvent bankruptcy estate.

3. Supervision of the distribution of assets.

The holding of the Court of Appeals, that the District Court had discretion to abdicate such basic functions to a state court, will unless reversed, establish a precedent very harmful to creditors in bankruptcy proceedings throughout the United States.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the decree of the United States Court of Appeals for the Seventh Circuit should be granted.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS of the United States of America,
Petitioner,

By .....
JOHN S. MILLER,
Attorney for Petitioner.

APPENDIX.

Opinion of Court of Appeals as Modified on Denial of Rehearing.

Before KERNER, FINNEGAN and LINDLEY, Circuit Judges.

KERNER, Circuit Judge.

This is the fifth appeal or series of appeals in the bankruptcy proceeding of Joslyn since that proceeding was reopened in 1946, ten years after his discharge in 1936.

The present appeals are from orders by which the District Court sought to terminate the seemingly endless litigation which developed after the District Court reopened the proceeding on grounds of fraudulent concealment of assets. The assets alleged to have been concealed consisted of the bankrupt's interest in the income of two trust estates established by his parents for himself and other members of his family prior to his voluntary petition in bankruptcy and not scheduled therein by him—assets which, under Illinois law, probably are not subject to execution but which this court has since held are administrable in bankruptcy. The creditor upon whose petition the proceeding was reopened, hereafter referred to as the Elks, based its claim against the bankrupt upon the latter's stockholder's superadded liability for the debts of an insolvent bank, a claim also asserted by Hillmer and others as plaintiffs in a representative suit then and still pending in the Superior Court of Cook County, Illinois, intended to recover the amounts due under the Illinois law from all stockholders in a bank incorporated under Illinois law, including this bankrupt, and brought in behalf of all creditors, including the Elks.

The final decree and other orders from which the present appeals stem allowed a motion by the bankrupt to strike a motion by the Elks for reassignment of the case for prejudice, denied a motion by the trustee in bankruptcy for leave to file a petition for certificate of civil and criminal contempt and his petition for injunctive relief, approved the well-considered report of the referee in bankruptcy, vacated restraining orders theretofore entered against the trustees of the family trusts except as they were directed to withhold a fund of $50,000 for possible further fees, costs and expenses, vacated orders restraining all persons from prosecuting suits against the bankrupt, denied without prejudice a petition for leave to intervene filed by a group of other stockholders, dismissed a counterclaim filed by the trustee in bankruptcy against those would-be intervenors, allowed fees and costs in the proceedings, directed the trustee in bankruptcy to dismiss certain plenary suits against the family trustees and others, and reserved jurisdiction to adjudicate any remaining claims against the bankrupt for fees, costs and expenses.

The facts of the various aspects of this unduly protracted proceeding have been fully stated in four opinions in the earlier appeals. See *In re Joslyn*, 7 Cir., 168 F. 2d 803, 171 F.2d 159, 179 F.2d 70 and 361. They are also succinctly stated in the opinion of the Illinois Appellate Court in a matter which that court considered to be inseparably connected with the bankruptcy proceeding. See *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 449, 457, 86 N.E.2d 367, appeal denied, 341 Ill. App. xiv. We deem it unnecessary to restate the background facts of the litigation again. As we view these appeals, the only serious question is whether the District Court abused its discretion in, in effect, approving the final settlement of the bankrupt's stockholder's liability in the state court and terminating the bankruptcy proceeding on the basis of that settlement.

The controversy on the present appeals presents the unusual situation of an adjudicated bankrupt, now fully solvent, having assets far more than enough to pay any claims which might be determined against him in this proceeding, who asked the bankruptcy court to fix those claims and authorized his representatives to pay them in full as fixed by the court, but was resisted on that application by the trustee in bankruptcy. That officer of the court insists upon his right to have all the assets of the bankrupt turned over to him to handle and distribute. While the matter was still pending in the bankruptcy court the father of the bankrupt filed a petition in the state court in the representative suit to which the bankrupt was a party defendant, asking leave to pay the principal amount in full to the receiver upon entry of judgment for that full amount against his son. This was done after informal consultation between the state court judge and the bankruptcy judge who found no objections to this practical solution of the litigation.

[1, 2] We are in entire accord with the District Court's final disposition of this protracted proceeding as explained in his excellent opinion reported in 102 F. Supp. 521. We agree that the receiver appointed in the state court representative suit was the proper claimant to receive the moneys here involved. That suit was brought in behalf of all creditors, including the Elks who have participated in distributions of moneys collected thereby to date, in accordance with the provisions of the state law. See *Hillmer* v. *Chicago Bank of Commerce,* 375 Ill. 266, 31 N.E. 2d 309. According to the Illinois decisions, a class action in equity is the proper mode of enforcing this superadded liability, and when a bank is being liquidated because of insolvency, and a representative action is pending, an individual creditor cannot maintain an action at law to enforce the liability. *Decker* v. *Domoney,* 387 Ill. 524, 56 N.E. 2d 750; *Zimmerman*

v. *Zeimer,* 363 Ill. 220, 1 N.E. 2d 854; *Babka Plastering Co.* v. *City State Bank,* 264 Ill. App. 142 See also 3 Zollmann, Banks and Banking, §§ 1842, 1823. We think these authorities fully support the District Court's disposition of the claim, in effect approving its settlement in the state court where judgment was entered for the full principal amount of the bankrupt's stockholder's liability and satisfied by payment of that amount in his behalf to the receiver.

Appellants contend that our ruling in 171 F.2d 159, 167, that "the Elks has a provable claim in the bankruptcy proceeding" is in conflict with this ruling. They assert that it follows from our earlier decision that some 12,000 creditors of the bankrupt who have participated in the state representative suit, as well as some 15,000 others who have not participated therein for reasons not disclosed on this record, are entitled to have this bankruptcy proceeding held open for the possible filing now of claims by any or all of these participating or non-participating creditors, all of which claims accrued between April 5, 1930, when the bank commenced business, and June 25, 1932, when it was closed by order of the Auditor of Public Accounts. As the trustee put it in his petition for injunctive relief, "said 15,000 (or more) creditors * * * are each individually potential creditors in bankruptcy having the right to file provable claims in this bankruptcy proceeding, and the right to receive their respective distributive shares of the administrable assets of the bankruptcy estate herein during the usual course of administration" pursuant to the mandate of this court.

It is to be remembered that when we made the ruling now relied upon by appellants we were considering an appeal from the dismissal of the entire reopened proceeding on the ground that the Elks was not a creditor of the bank-

ruptcy estate, and we considered the Illinois decisions cited above in the light of that ruling without seriously considering the right of the representative who had also asserted his claim in the reopened proceedings to prosecute it there. Although we had referred to the fact that the status of the Elks in the matter was immaterial since the trial judge could have reopened the bankruptcy proceedings *sua sponte* when his attention was called to the fact that it appeared that the bankrupt had fraudulently concealed assets, we nevertheless ruled that their claim was provable. In this situation we thought that the case, *Brown* v. *O'Keefe*, 300 U.S. 598, 57 S.Ct. 543, 81 L.Ed. 827, was authority for the proposition that the claim was provable in bankruptcy even though the stockholder had been adjudicated a bankrupt and discharged prior to liquidation of the liability and fixing of the amount thereof in the state court proceeding. But we must note now, with reference to the relative status of the representative and the individual creditors, that the claimant in the Brown case was the receiver duly appointed pursuant to the National Banking Act, a status which appears to us to be comparable to that of the receiver appointed in the course of a creditor's representative suit to enforce stockholders' liability under the Illinois law. We think Judge Igoe properly recognized this in his disposition of the cause in accordance with the judgment of the state court which had jurisdiction over the class suit. We find no violation of his discretionary powers in the action taken.

The various parties seek to raise many issues on these appeals—the court's disposition of the affidavit of prejudice and of the petition for certificate of contempt, new claims filed against the bankrupt by "non-participating creditors" in the state court proceedings, the so-called ousting of the bankruptcy court's paramount jurisdiction by its

final decree, and others. We have considered all of these issues and find them without merit, and we are convinced that no good purpose would be served by stating the facts or discussing the law pertaining to any of them.

Judgment affirmed for reasons stated by the District Court in his opinion.

IN THE

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OCTOBER TERM, 1952.

NO.

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT. BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, *Petitioner,* VS. GEORGE R. JOSLYN, et al., *Respondents.*	Petition for Writ of Certiorari.

PETITIONER'S BRIEF IN SUPPORT OF FOREGOING PETITION.

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Basis of Jurisdiction.

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Statement of the Case.

See "Summary Statement of Matters Involved," petition, p. 3 ff.

Assigned Errors.

1. The District Court erred in not exercising its exclusive jurisdiction to adjudicate the issue whether or not interest accrued upon the bankrupt's admitted principal liability of $57,100.
2. The District Court erred in not holding that such interest accrued and was payable to the creditors in the bankruptcy proceeding.
3. The District Court erred in holding that the creditors in the bankruptcy proceeding were bound by the state court decree of July 18, 1951.
4. The District Court erred in holding that the release delivered to the bankrupt by the state court receiver discharged the bankrupt's liability to the creditors in the bankruptcy proceeding.
5. The Court of Appeals erred in holding that the District Court had discretion and power to enter the Final Decree appealed from.
6. The Court of Appeals erred in affirming and not reversing the Final Decree appealed from.

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Summary of Argument.

The fact that this proceeding has been long in the courts is no justification for the decree appealed from or affirmance of it by the Court of Appeals. The delays were not due to fault of the Elks but to the bankrupt's fraud and maladministration by the District Court. 25

The entry of the Final Decree appealed from was not, as held by the Court of Appeals, an exercise of discretion by the District Court. That court had no power to enter it. 25

The matters adjudicated by the state court decree of July 18, 1951 were wholly within the exclusive jurisdiction of the District Court and the Elks had a right to have them adjudicated by it. 26, 27

If the District Court Judge acquiesced in or consented to the entry of that state court decree this would not validate it. 27

The decree was a nullity so far as concerns the bankruptcy proceeding; and the District Court had no jurisdiction to hold that the Elks were bound by it, or that the incident release discharged the bankrupt's liability to the Elks. 27

The bankruptcy estate being solvent, interest is due upon the admitted principal liability ($57,100) at the rate of 5% per annum, both on general equitable principles and also because of unreasonable and vexatious delay of payment. 28

The Court of Appeals so far sanctioned such a departure by the District Court from the accepted and usual course of proceedings in bankruptcy as to call for an exercise of this Court's power of supervision 30

ARGUMENT.

I.

Both the Court of Appeals and the District Court emphasize in their respective opinions the fact that the administration of this bankruptcy proceeding has been protracted. This was certainly not due to any fault of the Elks. Clearly it was due in the first instance to the bankrupt's fraud, and later to maladministration by the District Court, as is evidenced by the fact that that Court was reversed by the Court of Appeals in every one of the three adjudicated appeals from administrative orders entered by it. (168 F. 2d 803; 171 F. 2d 159; 179 F. 2d 70.)

Desire to terminate the proceeding is surely no justification for depriving the Elks of its right to an adjudication of its claim by the bankruptcy court and relegating this adjudication and the distribution to the state court.

II.

No Exercise of Discretion is Involved. The District Court Had No Power to Enter the Final Decree.

The Court of Appeals considered the Final Decree an exercise of discretion by the District Court. (Tr. 424, 426.) On the contrary, the District Court had no power to enter it.

The bankruptcy court had exclusive jurisdiction to adjudicate the question whether the Elks' claim bore interest, to collect the amount it found due, and make distribution in the proceeding.

These functions were inherent parts of the administration of the bankruptcy proceeding, and within the delegation of powers under Art. I §8 of the United States Constitution, 11 U.S.C. §11, and 28 U.S.C. §1334.

> U. S. Constitution, Art. I §8: "The Congress shall have Power . . . to establish uniform Laws on the subject of Bankruptcies throughout the United States;"
>
> 11 U. S. C. § 11: "a. The courts of the United States hereinbefore defined as courts of bankruptcy . . . are hereby invested . . . with such jurisdiction . . . as will enable them to exercise original jurisdiction in proceedings under this title . . . to . . . (2) Allow claims, disallow claims . . .; (7) Cause the estates of bankrupts to be collected, reduced to money and distributed. . . ."
>
> 28 U. S. C. §1334: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

The adjudication of claims against the bankrupt and collection and distribution of his estate, are basic functions of a court of bankruptcy clearly within the exclusive jurisdiction of the court administering the bankruptcy, both under the foregoing enactments and under decisions of the Supreme Court (*U. S. Fidelity Co.* v. *Bray,* 225 U.S. 205, 218 (1911), *Pepper* v. *Litton,* 308 U.S. 295, 304 (1939)).

In the *Bray* case, the Supreme Court remarks, with respect to such exclusive powers (225 U.S., p. 218), that "Creditors are entitled to have this authority exercised."

Referring to the exclusive powers of a bankruptcy court the Supreme Court remarks in its opinion in the *Pepper* case (308 U.S., p. 304):

> "Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankruptcy. . . . In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts."

The bankruptcy court cannot consent to the exercise of these exclusive functions by another court; and it is irrelevant if in this case the District Court judge consented to or acquiesced in the state court order (*U. S. Fidelity Co.* v. *Bray*, 225 U.S. 205, 218 (1911); *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 739 (1930)).

Examples of the exercise of such jurisdiction in bankruptcy, in issues respecting interest on claims, are: *New York* v. *Saper*, 336 U.S. 328 (1948); *Littlefon* v. *Kincaid*, 179 F. 2d 848 (CCA 4th C. 1950) cer. den. 340 U.S. 809; *Johnson* v. *Norris*, 190 Fed. 459 (C.C.A. 5th C. 1911).

The issues adjudicated by the state court being within the exclusive jurisdiction of the bankruptcy court, the District Court had no power to hold that the Elks were bound by the state court order entered July 18, 1951, and had no power to hold that the release executed by the state court receiver released the bankrupt from the claim of the Elks, either principal or interest (*U.S. Fidelity Co.* v. *Bray*, 225 U.S. 205, 218 (1911); *Pepper* v. *Litton*, 308 U.S. 295, 304 (1939). See also *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819) and *International Shoe Co.* v. *Pinkus*, 278 U.S. 261 (1928).

The state court order of July 18, 1951 was, under the authorities cited above, an utter nullity so far as the bankruptcy proceeding was concerned. It and the incident release left the bankrupt still as liable as before its entry to the creditors in bankruptcy.

Had the order the effect to release the bankrupt's liability to the bankruptcy creditors, it would take from administration in bankruptcy administrable assets of the bankrupt. If the father's payment (whether from his own

funds or from funds obtained from or loaned to the bankrupt) released the bankrupt's liability in bankruptcy, a bankrupt could thwart his bankruptcy creditors and bring about a distribution outside of bankruptcy. In fact just such a distribution occurred by the payment of fees (Tr. 392).

III.

The bankruptcy estate being solvent, interest is due upon the admitted principal liability of $57,100 to the extent of the surplus over the total claims and expenses in the bankruptcy proceedings.

In note 7 to its opinion in the case of *New York* v. *Saper*, 336 U.S. 328, 330 (1948) the Supreme Court states the applicable law: that where a bankrupt (*i.e.*, his bankruptcy estate) proves solvent, interest is due the bankruptcy creditors before any surplus reverts to him.

This rule was recognized and applied in bankruptcy proceedings in *Johnson* v. *Norris*, 190 Fed. 459, 461-5 (C. C. A. 5th C. 1911), *Miles Corporation* v. *Lindel*, 107 F.2d 729, 732 (C.C.A. 8th C. 1939) and *Littleton* v. *Kincaid*, 179 F.2d 848, 852-3 (C. A. 4th C. 1950)

Under the holding in the *Johnson* case the interest accrues upon all claims proved and allowed.

The applicable rate is 5% under the provisions of the following statute of Illinois:

> "The rate of interest upon the loan or forbearance of any money, goods or things in action, shall be five dollars ($5) upon one hundred dollars ($100) for one year, and after that rate for a greater or less sum, or for a longer or shorter time. . ." Ill. Rev. St. 1951, State Bar Assn. Edn., Ch. 74 "Interest" §1.

IV.

The interest is payable not merely under general equitable principles, as held in the foregoing cases, but also because of the bankrupt's unreasonable and vexatious delay of payment.

Such liability is codified in Illinois:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due. . . on money withheld by an unreasonable and vexatious delay of payment." Ill. Rev. St. 1951, Stat Bar Assn. Edn., Ch. 74 "Interest" §2.

It is recognized in the following, among many, decisions of the Illinois courts: *Duncan* v. *Dazey,* 318 Ill. 500, 526-7 (1925); *Borden & Selleck Co.* v. *Fraser & Chalmers,* 118 Ill. App. 655, 661-2 (1905). Also by this Supreme Court in *Chicago* v. *Tebbetts,* 104 U.S. 120, 125 (1881); and by other Federal Courts in *Reconstruction Finance Corp.* v. *Goldberg,* 143 F. 2d 752, 759 (CCA 7th C 1944): *Reconstruction Finance Corp.* v. *Pelts,* 123 F.2d 503, 505 (CCA 7th C 1941); *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.,* 85 F. 2d 531, 536 (CCA 2nd C 1936); and *Riverside Fibre and Paper Co.* v. *O. C. Keckley & Co.,* 32 F. 2d 23, 26 (CCA 7th C 1929).

The present case is a most extreme instance of unreasonable and vexatious delay of payment. The fraudulent bankrupt admitted the principal amount of the liability in his first (fraudulent) schedule, obviously for the purpose of being discharged from it. He succeeded by his fraud in getting his discharge in 1936. From then until the bankruptcy proceeding was reopened in 1946, although owning properties worth, on his own admission, over

$500,000, he made no payment. Since this proceeding was reopened (for his fraud) in 1946, he has resisted payment with no sound legal reason whatever, as the principal amount was admitted and his interests in the trusts were administrable in bankruptcy. Finally, by an unlawful maneuver in the state court, he has thwarted adjudication of his liability and collection and distribution of the estate in the bankruptcy proceeding.

V.

The Court of Appeals so far sanctioned such a departure by the District Court from the accepted and usual course of bankruptcy proceedings as to call for an exercise of the Supreme Court's power of supervision.

The bankruptcy court unlawfully departed from the accepted and usual course of bankruptcy proceedings:

1. By surrendering to the state court the adjudication of the interest issue while that issue was pending before the District Court under advisement.
2. By holding that the state court decree bound the bankruptcy creditors and discharged the bankrupt from liability to them.
3. By failing to adjudicate the question whether the bankrupt's admitted principal liability of $57,100 bore interest.
4. By not holding that the liability did bear interest.
5. By ordering the trustee in bankruptcy to dismiss the plenary suits brought by him for the purpose of collecting the assets of the bankruptcy estate although the bankruptcy creditors remain unpaid.

6. By terminating the bankruptcy proceeding (except for allowance of fees and expenses) although the assets remained uncollected and the creditors had not been paid.

The Elks was seriously injured by the loss of some twenty-years' interest on its claim in bankruptcy.

The Court of Appeals sanctioned this departure by affirming the Final Decree.

It is submitted that the foregoing constitutes sanction by the Court of Appeals of such grave departure by the District Court from the accepted and usual course of bankruptcy proceedings as to call for an exercise by the Supreme Court of its power of supervision.

CONCLUSION.

The Final Decree appealed from was, for the reasons shown, without the jurisdiction of the District Court and in conflict with the law as decided by this Court; and by it the District Court departed drastically and unlawfully from the accepted and usual course of bankruptcy proceedings. The Final Decree constituted a flagrant abandonment by the District Court of its exclusive jurisdiction which, if the affirmance by the Court of Appeals is not reversed, will constitute a precedent seriously affecting administration of bankruptcy proceedings.

The writ of certiorari should issue as prayed in the petition.

Respectfully submitted,

JOHN S. MILLER,
Attorney for Petitioner.

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FILED
FEB 6 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 445

IN THE MATTER OF
GEORGE R. JOSLYN,
BANKRUPT.

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,
Petitioner,
vs.
GEORGE R. JOSLYN, et al.,
Respondents.

Petition for Writ of Certiorari.

AMENDMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

Petition for Writ of Certiorari.

AMENDMENT TO PETITION OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The following paragraph, appearing at top of page 8 of the petition:

> "Upon learning of the foregoing proceedings in the state court the trustee in bankruptcy and the Elks unsuccessfully endeavored in the state court to have the state court order vacated and to induce the bankruptcy court not to enter the final decree appealed from. (Tr. 242-243, 249-260, 268-279, 279-283, 294-310, 326-334.)"

is amended to read as follows:

> "Upon learning of the foregoing proceedings in the state court the Elks unsuccessfully endeavored in the state court to have the state court order vacated and the trustee in bankruptcy and the Elks unsuccessfully endeavored to induce the bankruptcy court not to enter the final decree appealed from. (Tr. 242-243, 249-260, 268-279, 279-283, 294-310, 326-334.)"

THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA,

Petitioner,

by .....

JOHN S. MILLER,

Attorney for Petitioner.

Office - Supreme Court, U.S.
DEC 11 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

VS.

GEORGE R. JOSLYN, *Et Al.,*
Respondents.

PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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HORACE A. YOUNG, as Trustee in Bankruptcy, *Pro Se.*
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____

IN THE MATTER OF GEORGE R. JOSLYN,
BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

GEORGE R. JOSLYN, *Et Al.,*
Respondents.

PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matters Involved.

Your Petitioners, NEW JERSEY EQUITIES COMPANY and HORACE A. YOUNG, as Trustee in Bankruptcy, praying for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit made and entered in this cause on July 2, 1952 (Tr. 428), rehearing denied September 29, 1952 (Tr. 511-2), respectfully submit:

For purposes of brevity, and in order to lighten the labors of this Court, Petitioners adopt in all respects the "Petition of The Benevolent and Protective Order of Elks of the United States of America for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and Brief in Support Thereof" heretofore filed in this Court as Docket No. 445, to the same extent as though all of said Petition and Supporting Brief were set forth fully and at length herein.

However, Petitioners desire to add to both said Petition and Supporting Brief of The Benevolent and Protective Order of Elks of the United States of America certain additional facts and certain additional argument as follows:

Summary Statement of Additional Matters Involved.

(1) Petitioner, New Jersey Equities Company, is a substantial creditor of the fraudulent bankruptcy estate of George R. Joslyn (Tr. 335) and is one of a group of so-called "non-participating" bankruptcy creditors (*i.e.* "non-participating" in the sense that they have not filed claims and never have received, and never will receive, any funds distributed or to be distributed in the Illinois State Court proceedings referred to in said Petition and

Brief in Docket No. 445. (Tr. 276, 425). Said "non-participating" bankruptcy creditors hold bankruptcy claims which are presently unpaid in the total sum of $1,207,155.10 (Tr. 276, 425).

There are also so-called "participating" bankruptcy creditors, including The Benevolent and Protective Order of Elks of the United States of America (filing said Petition in Docket No. 445), whose presently unpaid bankruptcy claims total $1,182,161.98 (Tr. 276, 425).

Petitioner, New Jersey Equities Company, speaks in this Petition for itself and for all of said "non-participating" bankruptcy creditors, not by any right of direct representation, but in the sense that all of such "non-participating" bankruptcy creditors are in the same situation, *i.e.* none of them has ever received or ever will receive any part of the sum of $57,100 or any other funds distributed or to be distributed in the Illinois State Court proceedings hereinabove mentioned. All of them will have been irretrievably injured by the final decree appealed from, unless this Court shall grant the writ of certiorari sought herein, for the reasons hereafter stated.

Petitioner, Horace A. Young, as Trustee in Bankruptcy, speaks for and represents all of said bankruptcy creditors in the Bankruptcy Court, whether "non-participating" or "participating".

(2) Neither Petitioner, New Jersey Equities Company, nor any other "non-participating" bankruptcy creditor, nor Petitioner, Horace A. Young, as Trustee in Bankruptcy, ever had any actual knowledge of or ever participated in the State Court proceedings involved in this matter prior to the time of the entry of the State Court order of July 18, 1951 (Tr. 242). No order was ever entered in the bankruptcy proceedings of the fraudulent bankrupt, George

R. Joslyn, either prior or subsequent to the entry of the State Court order of July 18, 1951, authorizing or directing Petitioner, Horace A. Young, as Trustee in Bankruptcy, to participate in said State Court proceedings. The first knowledge that Petitioner, New Jersey Equities Company, or any of the other "non-participating" bankruptcy creditors, or the Trustee in Bankruptcy, had of the State Court proceedings was on or a few days before September 11, 1951, when the fraudulent bankrupt disclosed the same to the Bankruptcy Court and obtained leave to file in the Bankruptcy Court a certified copy of said State Court order and a duplicate original of the purported "release" executed by the State Court Receiver in accordance therewith (Tr. 242-3).

On September 13, 1951, two of the bankruptcy creditors (The Benevolent and Protective Order of Elks of the United States of America and John Marshall Law School, the latter not yet having filed any bankruptcy claim) sought to intervene in the State Court proceedings to attack the order of July 18, 1951, but their motion for leave to intervene was denied on September 20, 1951 (Tr. 295-310, 347-8, 358-365).

(3) The fraudulent bankrupt, George R. Joslyn, having obtained his discharge in bankruptcy on June 29, 1936, asserted said discharge at all times thereafter as a valid defense to his stockholder's liability in the State Court proceeding (Tr. 354-6). At the time the order of July 18, 1951 was entered in the State Court proceeding, no reference was made to the defense of the discharge in bankruptcy still asserted therein as a defense by the fraudulent bankrupt, George R. Joslyn, therein (Tr. 246-7, 348-9, 353).

(4) The State Court order of July 18, 1951 was not a judicial decree, but was merely a *consent order* (Tr. 353).

It bore at the foot thereof the signatures of all of the parties appearing in the State Court in the summer vacation period before the emergency judge, except the attorney for Marcellus L. Joslyn, the father of the fraudulent bankrupt, who also represented the bankrupt in the Bankruptcy Court (Tr. 353). His consent was evidenced by the fact that he presented the petition seeking the entry of the order. The State Court Judge (Julius J. Hoffman) stated that: "It took a couple of hours to persuade the lawyers to place their signatures on the order", and that he would not have entered the order if it had not been "agreed to" (Tr. 393). Moreover, the State Court Judge clearly stated that he would not have entered the *consent order* if he had not been under the erroneous impression that all of the attorneys interested in the matter were then before him (Tr. 393-4).

Such consent orders are not judicial decrees, but are mere agreements of the consenting parties judicially recorded.

(5) The amount of interest due upon the claims of the bankruptcy creditors in the "solvent" bankruptcy estate (Tr. 424) was not and is not a trivial sum. At the time of the entry of the order appealed from in the Bankruptcy Court, the amount of such interest exceeded the sum of $40,000, and this fact was made known to the Bankruptcy Court by the Trustee in Bankruptcy prior to the entry of the final decree appealed from (Tr. 281). It was also embodied in the Referee's Report filed long previously on March 16, 1951 (Tr. 131).

(6) The defunct Chicago Bank of Commerce was an Illinois state bank, not a national bank. Each of the creditors of Chicago Bank of Commerce, including Petitioner, New Jersey Equities Company, and each of the other "non-participating" creditors holding presently un-

paid bankruptcy claims totaling $1,207,155.10, as well as each of the so-called "participating" bankruptcy creditors holding presently unpaid bankruptcy claims totaling $1,182,161.98, were individual creditors of the bank entitled under Illinois law to sue the bank's stockholders (Tr. 425). Under Illinois law, the filing by a representative bank creditor of a suit against stockholders to enforce their stock liability prevents the filing thereafter of individual suits against stockholders by other bank creditors (Tr. 425).

In this respect, the liquidation of a national bank differs from the liquidation of an Illinois state bank. Under Title 12, Sec. 191-2 of the United States Code, the Receiver appointed by the Comptroller of the Currency under Title 12, § 191 has the exclusive right to enforce the individual liability of the stockholders, if necessary to pay the debts.

(7) The final decree appealed from, which was entered in the District Court and affirmed in the Court of Appeals, permanently harms the bankruptcy administration and the bankruptcy creditors (1) because it held that the creditors' claims have all been adjudged satisfied in the Illinois State Court and the bankrupt fully discharged from all liability therefor, and (2) because it ordered the Trustee in Bankruptcy to dismiss the three pending plenary actions to collect the administrable bankruptcy assets, and modified the restraining orders preventing dissipation of said administrable assets, and (3) because it prevents the collection of the administrable bankruptcy estate and the adjudication and payment of bankruptcy claims, including over $40,000 of interest thereon, in the Bankruptcy Court.

The fraudulent bankruptcy was re-opened in 1946, and the plenary actions were filed within two years thereafter (Tr. 129, 268; *Young* v. *Handwork,* 179 F. (2d) 70 at 71, cert. den. 339 U.S. 959, rhrg. den. 339 U.S. 991). In view

of the fact that more than five years had already elapsed between the re-opening of the fraudulent bankruptcy and the entry of the final decree appealed from on November 8, 1951, that part of the decree appealed from directing the Trustee in Bankruptcy to dismiss the three pending plenary actions to collect the administrable assets is prejudicial to the bankruptcy estate and creditors because such suits cannot be reinstituted either within the two-year statutory period for the commencement of such actions under Section 11(e) of the Bankruptcy Act, or within the five-year statutory limitation period under state law (Illinois), likewise referred to in Section 11(e) (Tr. 129).

The final decree herein appealed from, as we have said, permanently harms the bankruptcy administration and the bankruptcy creditors because it modified the four restraining orders so as to release to the bankrupt the same administrable assets which the Trustee in Bankruptcy was attempting to collect in the plenary actions, and which were conceded by the sworn statement of the bankrupt himself to have a value in excess of $500,000 (Tr. 235; *In re Joslyn's Estate,* 168 F. (2d) 803 at 804). The purpose and effect of these four restraining orders was to prevent the fraudulent bankrupt and his personal Trustees (the Trustees of the Joslyn Trusts) from dissipating the administrable assets pending their collection and administration by the Trustee in Bankruptcy in the Bankruptcy Court (Tr. 385).

The fraudulent bankrupt, George R. Joslyn, fraudulently instituted these voluntary bankruptcy proceedings in 1936 for the purpose of depriving his bankruptcy creditors of their right to adjudicate and satisfy their bankruptcy claims, and for the purpose of preventing the bankruptcy administration of these very bankruptcy assets of

a value of more than $500,000, as established by "the law of the case" in the three prior appeals to the Seventh Circuit Court of Appeals (see page 4 of the Petition for Certiorari in Docket No. 445).

The effect and decision of the Court of Appeals is therefore (1) to repudiate the "paramount and exclusive jurisdiction" of the Bankruptcy Court over the fraudulent bankruptcy estate of George R. Joslyn; (2) to permit the consummation by the bankrupt of the fraudulent scheme initiated by him in 1936, and persisted in by him to the present date; (3) to substitute bankruptcy administration by a State Court in place of the Bankruptcy Court, by permitting the State Court to adjudicate the bankruptcy claims and satisfy them for more than $40,000 below the amount payable thereon in the Bankruptcy Court and to discharge the same; (4) to deprive Petitioner, New Jersey Equities Company, and the other "non-participating" bankruptcy creditors of the right to receive one penny of the bankruptcy assets, at the same time freeing to the fraudulent bankrupt administrable property valued by him in his own sworn schedule at more than $500,000; and (5) by preventing the Trustee in Bankruptcy from collecting any of the administrable assets for the purpose of paying the unpaid bankruptcy creditors, including the sums due them by way of interest in the "solvent" bankruptcy proceeding.

Questions Presented, Basis of Jurisdiction, Opinions Below and Assigned Errors.

See Petition of The Benevolent and Protective Order of Elks of the United States of America for Writ of Certiorari in Docket No. 445 and Brief in Support Thereof, all heretofore adopted and incorporated by Petitioners herein.

Reasons Relied On For Allowance of Writ.

The decision of the Court of Appeals in this case violates the paramount and exclusive jurisdiction of the Bankruptcy Court, and thereby violates the most basic and fundamental principles of bankruptcy law. It is therefore directly in conflict upon a question of fundamental Federal law with the Constitution and Statutes of the United States and the decisions of this Court and the other Courts of Appeals, and thereby justifies and requires an exercise of this Court's power of supervision.

Petitioner, New Jersey Equities Company, is a bankruptcy creditor in a substantial amount. Petitioner, New Jersey Equities Company, never participated in any way whatsoever in the State Court representative suit and has never received any distribution or payment upon its bankruptcy claim of any kind, nature or description, either through such proceeding or otherwise (Tr. 335-6). Not only Petitioner, but all of the other "non-participating" creditors holding provable bankruptcy claims in the amount of $1,207,155.10, will never receive any payment thereof if the District Court's order as affirmed by the Court of Appeals is not reversed by this Court.

Petitioner, Horace A. Young, as Trustee in Bankruptcy, speaks not only for the "non-participating" creditors, but also for the so-called "participating" creditors holding provable bankruptcy claims totaling $1,182,161.98.

It is thus beyond controversy that Petitioner, New Jersey Equities Company, and the other "non-participating" creditors have been deprived and will be forever deprived of their distributive share of the sum of more than $97,100 ($57,100 plus more than $40,000 of interest) by the order here appealed from. Moreover, the so-called "participating creditors", including the Order of Elks, for whom the

Trustee in Bankruptcy also speaks, will similarly be deprived of their distributive share of more than $40,000 of interest even if it be conceded (which they do not concede) that the distribution of all or some part of the sum of $57,100 paid to the State Court Receiver under the State Court order should ultimately be held in the bankruptcy proceedings to be properly credited upon their bankruptcy claims.

The creditors, "participating" or "non-participating", have never waived their respective rights to have their bankruptcy claims adjudicated and satisfied in the Bankruptcy Court. Nor has the Trustee in Bankruptcy ever waived his right to collect the administrable assets and distribute the same in the bankruptcy proceedings after the adjudication of the bankruptcy claims by the Bankruptcy Court.

If the relief sought in this Court be not granted, the fraudulent purposes of the bankrupt will be consummated and when the bankruptcy proceedings are finally closed, the bankruptcy creditors will be deprived of any payment to them of more than $40,000 of interest due them upon their claims against the solvent bankruptcy estate; and Petitioner, New Jersey Equities Company, and the other "non-participating" creditors will receive no payment whatsoever of their distributive share of the sum of $57,100 to which they are entitled upon their bankruptcy claims.

This case raises in the sharpest possible manner the question whether the Federal Bankruptcy Court has "*discretion*" to repudiate its "paramount and exclusive *jurisdiction*" in bankruptcy matters, and to substitute therefor an administration in the State Court which is uncontrovertibly prejudicial to the bankruptcy creditors. Not only is this matter important, but it is in fact crucial to the administration of all bankruptcy proceedings hereafter in

the Federal Courts. *It is essential to the effective operation of the Federal Bankruptcy Act and the preservation of the paramount and exclusive jurisdiction of the Federal Courts in bankruptcy matters that the decision of the Court of Appeals affirming the District Court be reversed.*

If the clear language of the Bankruptcy Act and the numerous decisions of this Court and the other Courts of Appeals establishing and enforcing the paramount and exclusive jurisdiction of the Bankruptcy Court in bankruptcy matters are to be overthrown, it should only be by a square decision of this Court to that effect.

Wherefore, Petitioners pray that a writ of certiorari under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that said final order of said Court of Appeals be reversed or altered by this Honorable Court; and Petitioner also prays for all such other, further or different relief as may seem proper.

NEW JERSEY EQUITIES COMPANY

By .....
GERALD G. BARRY, ITS ATTORNEY

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,

By .....
PRO SE, PETITIONERS.

BRIEF AND ARGUMENT.

As above indicated, Petitioners adopt the brief and argument attached to the Petition for Writ of Certiorari heretofore filed in Docket No. 445.

The Court of Appeals' opinion appears to be wholly based upon the false premise that the final decree appealed from was within the proper exercise of the "discretion" of the District Court. Expressed negatively, the Court of Appeals refused to disturb the final decree, upon the theory that it would not disturb the proper exercise of "discretion" by the District Court.

By so holding, the Court of Appeals completely misapprehends the fundamental existence of the paramount and exclusive jurisdiction of the District Court in bankruptcy proceedings.

Certainly the Court of Appeals fails to indicate how the District Court can have "discretionary power" to defeat the "paramount and exclusive jurisdiction" of the Federal Bankruptcy Court. The two terms are mutually exclusive. As succinctly stated by this Court in *United States Fidelity & Guaranty Company* v. *Bray*, 225 U.S. 205, the Federal Bankruptcy Court has no power whatsoever, either "discretionary" or otherwise, to surrender its paramount and exclusive jurisdiction to any other Court, State or Federal, over all bankruptcy proceedings and particularly "the allowance, rejection and reconsideration of claims, the reduction of estates to money, and its distribution," etc. (p. 217).

We remind the Court of its conclusive words upon this subject in the same opinion (p. 218):

> "Of the fact that the suit was begun in the Circuit Court with the express leave of the Court of Bankruptcy, it suffices to say that *the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal.*" (Italics added.)

This Court has always in its subsequent references to the *Bray* case re-affirmed the strong language and clear holding of that decision. See, for example, *New York* v. *Irving Trust Co.*, 288 U.S. 329, 332 and *Pepper* v. *Litton*, 308 U.S. 295, 304.

The Court of Appeals for the Seventh Circuit itself stated the same rule in the important recent case of *In re Lustron Corp.*, 184 F. (2d) 789, cert. den. 340 U.S. 946, saying (p. 800):

> "After bankruptcy has occurred, the Bankruptcy Court is without power to surrender its paramount and exclusive jurisdiction." (Citing *U. S. F. & G. Co.* v. *Bray* and other Supreme Court and Federal cases.)

If the foregoing rule is the most fundamental principle of bankruptcy law, and we deem it to be, the Court of Appeals' decision affirming the District Court's decree upon the ground that the Bankruptcy Court had "discretion" or "discretionary powers" to surrender its paramount and exclusive bankruptcy jurisdiction must be wholly erroneous. By so holding the Court of Appeals has in effect wiped out the cornerstone of all bankruptcy law and has nullified the Federal Constitution, the Federal Bankruptcy Act and this Court's emphatic holdings to the contrary.

At this very October 1952 Term this Court has recognized that the rule that "the bankruptcy court normally supervises the liquidation of claims . . . . . is not inexorable

. . . . . and a sound discretion may indicate that a *particular controversy* should be remitted to another tribunal for litigation." *Nathanson* v. *National Labor Relations Board*, ... U.S. ...., 97 L. Ed. (Advance p. 13, 17). (Italics added). In the instant case this concept has been distorted by the Court of Appeals to the point of permitting a State court (1) to determine not only the principal amount of a claim (although the amount had been previously admitted and stipulated to in the bankruptcy proceeding) (2) by a consent order entered at a hearing of which neither the Trustee in Bankruptcy nor the creditors (petitioners here) had notice and in which hearing they did not participate (no order of remittal to the state court having ever been entered) and (3) then to *collect* and *distribute* the assets and (4) at the same time to satisfy and discharge the bankruptcy claims of creditors in such manner as to preclude the collection of $40,000 of interest due the creditors under bankruptcy law because of the solvency of the estate. Unless this Court intends by such language as that quoted above to retract what has been written as to the paramount and exclusive jurisdiction of Courts of Bankruptcy in the statutes and in numerous reported decisions of this and other courts across a period of many years, this Court must grant this petition and revise the judgment of the Court of Appeals. Otherwise the door is open for a lower Federal court to relegate any part or *all* of a bankruptcy proceeding to a State court.

We submit that the Court of Appeals, in reaching the foregoing conclusion, misapprehended the case of *Brown* v. *O'Keefe*, 300 U.S. 598. Since the *Brown* case is not discussed in the argument supporting the petition in Docket No. 445, and since the Court of Appeals places so much emphasis upon it, we will discuss that case here.

The *Brown* case was not a bankruptcy case, but was a suit by the receiver of a national bank in whom (unlike Illinois state banks, such as the Chicago Bank of Commerce) all of the bank creditors' rights to enforce the stockholders' liabilities are exclusively vested by Title 12, Sections 191-2 of the United States Code (12 U.S.C.A., Secs. 191-2). These sections provide:

> "191. . . . Whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may . . . appoint a receiver who shall . . . enforce the personal liability of the shareholders, as provided in section 192 of this title."
>
> "192. Such receiver . . . may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

In the case of the Chicago Bank of Commerce, the right to sue the stockholders is vested under Illinois law, exclusively in the bank creditors themselves, either singly or as a group, and is personal to each creditor. Some of the decisions are cited in the Court of Appeals' opinion (Tr. 425). These Illinois cases also hold that a representative suit filed on behalf of the bank creditors prevents the filing of subsequent individual suits for the same relief.

A State Court receiver in an Illinois stockholders' representative suit is a "stakeholder". His sole function is to receive and disburse moneys collected from the defendant stockholders. Unlike the receiver of a national bank, he is appointed in the representative suit after it is filed, not before it is filed.

The analogy which the Court of Appeals finds between such a stakeholder-receiver in a stockholders' representative suit in Illinois, on the one hand, and the national bank receiver of a national bank appointed by the Comptroller of the Currency, on the other hand, is obviously without any sound basis or justification.

Turning to the decision in the *Brown* case, Judge Cardozo's opinion explicitly states (p. 604) that he is not deciding whether such a national bank receiver could file a bankruptcy claim in the Bankruptcy Court. The only issue decided in the *Brown* case was that the bankruptcy discharge asserted by the bankrupt-defendant in a non-bankruptcy suit was valid and effective to protect him from any liability to a single bankruptcy creditor. The Court was careful to state in its opinion (p. 604-5) that the only issue which the Bankruptcy Court could refer to the State Court for determination was the "liquidation" of the principal amount of the bankrupt's total stock liability if the Bankruptcy Court did not desire to determine this issue for itself.

But once the principal amount of the bankrupt's stock liability was liquidated (as in the Joslyn bankruptcy here involved), the single creditor would have to file his bankruptcy claim in the Bankruptcy Court in order not to "lose his dividend from the assets and find his suit in equity (in the State Court) illusory" (p. 605).

In the case at bar, there has never been any doubt or question as to the "liquidation" or determination of the total principal amount of Joslyn's stock liability. In both his original (fraudulent) and amended bankruptcy schedules, as well as in numerous sworn petitions filed by the bankrupt in the Bankruptcy Court (Tr. 235-6), he consistently admitted, and the Referee confirmed (Tr. 235), that the principal amount of his total stock liability was "liquidated" at the face amount of the par value of his stock holdings in the sum of $57,100. It must follow that under prior Section 63(b) (now Section 57(d)) of the Bankruptcy Act, no proceedings in the State Court were necessary to "liquidate" and determine the total principal amount of the bankrupt's stock liability as a stockholder in the Chicago Bank of Commerce.

Applying the holding of the *Brown* case therefore, there was and is nothing left for the State Court by way of the "liquidation" or determination of the principal amount of Joslyn's total stock liability. The only Court having any jurisdiction to collect the principal amount of the bankrupt's stock liability as so "liquidated" or determined, and to pay the "dividends" from the bankruptcy "assets" was and is the Bankruptcy Court, as Judge Cardozo was careful to state on page 605 of his opinion, where these very words are used. His use of the word "Tomorrow" in this connection could only have been intended to prevent exactly the result which the Court of Appeals' decision affirming the District Court achieves in this case.

To summarize: The State Court Receiver in the representative suit under Illinois law in the case at bar has no claim or cause of action against the stockholder, whether bankrupt or not bankrupt, but is merely a *judicial stakeholder* without rights of any kind against the stockholder. In the bankruptcy case he has no standing as a creditor and is certainly not an officer of the Bankruptcy Court. His "status" cannot be "comparable" to that of the receiver of the national bank acting as sole "liquidating agent" in the *Brown* case; and even if his status were comparable, there is nothing in the *Brown* case which holds that even the national bank receiver in that case could collect the bankrupt's stock liability outside of the Bankruptcy Court. In fact, as above indicated, the holding in the *Brown* case was precisely to the contrary.

As if foreseeing this very case, Judge Cardozo made it crystal clear that the bankruptcy creditors, such as petitioner, New Jersey Equities Company, and the other creditor Appellants, shall not be prevented from recovering their "dividends" from the bankruptcy "assets," even

if the State Court had been appealed to in order to "liquidate" the total principal amount of Joslyn's stock liability (which was wholly unnecessary because of his admissions in the case at bar).

By so holding, this Court was safeguarding the "paramount and exclusive jurisdiction" of the Bankruptcy Court which it has never impaired, but has always supported and affirmed, in the long history of bankruptcy law.

CONCLUSION.

For the reasons indicated in this Petition, and in the Petition in Docket No. 445, it is plain, we submit, to anyone who reads the Court of Appeals' opinion that it rends asunder the entire fabric of bankruptcy law. The words "paramount" and "exclusive", when applied to the word "jurisdiction" in relation to bankruptcy, leave no room for the doctrine that the District Court retains "discretionary powers" to defeat such paramount and exclusive jurisdiction in bankruptcy by abdicating its functions in favor of the State Court.

In the case at bar, it appears that the bankruptcy creditors are permanently injured by the final decree appealed from. It leaves the bankruptcy creditors of George R. Joslyn with bankruptcy claims still admittedly unpaid in the Bankruptcy Court, which will never be paid if the Writ sought does not issue and the Court of Appeals' decision is not reversed.

It is submitted that the foregoing constitutes such a grave departure by the Court of Appeals and the District Court from the accepted and usual course of bankruptcy proceedings as to justify and require the allowance of the Writ under the powers of supervision by this Court.

The decision of the lower courts in this case constitutes a precedent seriously and adversely affecting the future administration of all bankruptcy proceedings.

The Writ of Certiorari should issue as prayed in this Petition.

Respectfully submitted,

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GERALD G. BARRY,

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